

*United States Court of Appeals
for the Second Circuit*



**SUPPLEMENTAL
BRIEF**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X

ELIJAH EPHRAIM JHIRAD,

Petitioner-Appellant,

DOCKET NO. 75-2102

-against-

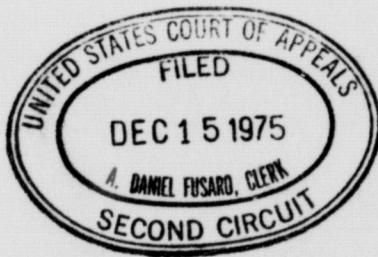
THOMAS E. FERRANDINA,
United States Marshal
Southern District of New York,

Respondent-Appellee.

-----X

GOVERNMENT OF INDIA'S BRIEF

B
P/S



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2

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES, STATUTES AND AUTHORITIES	i
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	3
POINT I - THE DISTRICT COURT DID NOT EXCEED THE MANDATE OF THE COURT OF APPEALS	9
POINT II - THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT APPELLANT INTENDED TO LEAVE INDIA FOR THE PURPOSE OF FLEEING FROM PROSECUTION.....	11
POINT III - THE PROPER STANDARD OF PROOF FOR ISSUES ARISING IN THE CONTEXT OF THIS INTERNATIONAL EXTRADITION PROCEEDING IS PROBABLE CAUSE.....	22
POINT IV - APPELLANT HAS NOT BEEN DENIED A FAIR HEARING CONSISTENT WITH THE PROCEDURES APPLICABLE TO EXTRADITION PROCEEDINGS.....	27
POINT V - THE STATUTE OF LIMITATIONS IS NOT A BAR TO THE EXTRADITION OF APPEL- LANT FOR ALL OF THE OFFENSES SET FORTH IN THE THREE (3) SEPARATE CHARGE SHEETS FILED UNDER INDIAN CRIMINAL PROCEDURE.....	30
POINT VI - THE EVIDENCE WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE WITH RESPECT TO ALL THE ESSENTIAL ELEMENTS OF THE CHARGE.....	34
POINT VII - APPELLANT HAS NOT SUSTAINED HIS BURDEN OF PROVING THAT THE OFFENSE FOR WHICH EXTRADITION IS SOUGHT IS ONE OF POLITICAL CHARACTER.....	44
CONCLUSION.....	46

TABLE OF CASES, STATUTES AND AUTHORITIES

	<u>Page</u>
<u>Asakura v. Seattle</u> 265 U.S. 332	23
<u>Assistant Customs Collector v. Melwani</u> §2, S.C.R. 438 Sup. Ct. India 1968).....	25
<u>Brouse v. United States</u> 68 F. 2d 294 (1st Cir. 1943).....	19, 24
<u>Dobbin v. United States</u> 157 F. 2d 257 (D.C. Cir. 1946).....	38
<u>Donnell v. United States</u> 229 F. 2d 560 (5th Cir. 1956).....	10, 13
<u>Factor v. Laubenheimer</u> 290 U.S. 276 (1933).....	22
<u>Fernandez v. Phillips</u> 268 U.S. 311 (1925).....	41, 43
<u>Geofroy v. Riggs</u> 133 U.S. 258.....	23
<u>Grin v. Shine</u> 187 U.S. 181.....	23
<u>Hansberry v. United States</u> 295 F. 2d 800 (9th Cir. 1961).....	38
<u>Hansborough v. United States</u> 156 F. 2d 327 (8th Cir. 1946).....	38
<u>In re Ross</u> 140 U.S. 453	23
<u>Jimenez v. Artistiqueta</u> 311 F. 2d 547 cert. den. 373 U.S. 914 (5th Cir. 1962).....	43
<u>Jordan v. Tashiro</u> 278 U.S. 123.....	23
<u>McNamara v. Henkel</u> 26 U.S. 523 (1912).....	22, 43
<u>National Life and Accident Insurance</u> v. <u>Gibson</u> 101 So. West 895, 41 Ky. Law Rep. 101.....	38

	<u>Page</u>
<u>Parnell v. State</u> 339 So. West 2d 49 (Texas Ct. of Crim. Appeal 1959).....	41
<u>People v. Cox</u> 286 N.Y. 137 (1941).....	32
<u>People v. Gibson</u> 218 N.Y. 70 (1916).....	37
<u>People v. Gold Key Club</u> 2 M. 2d 380, 23 A.D. 2d 740 (A56).....	32
<u>People v. Hines</u> 283 N.Y. 93.....	32
<u>People v. Virk</u> 62 M. 2d 1078 (1969).....	31
<u>People v. Reynolds</u> 214 App. Div. 21 (2d Dept. 1925).....	26, 27, 42
<u>People v. Robinson</u> 284 N.Y. 75 (1940).....	38
<u>People v. Von Cseh</u> 9 A.D. 2d 660 (1st Dept. 1959).....	41
<u>Sayne v. Shipley</u> 418 F. 2d 679 (5th Cir. 1969) cert. den. 398 U.S. 903 (1970).....	21
<u>State v. Nelson</u> 362 Mo. 129, 240 So. West 2d 140 (Sup. Ct. 1951).....	35
<u>Tewari v. Emperor</u> 32 Indian Law Rep. 1085 (1905).....	31
<u>Tinsley v. Bauer</u> 271 P. 2d 110 (Calif. 1954).....	41
<u>Tucker v. Alexandroff</u> 193 U.S. 424.....	23
<u>United States v. Howell</u> 240 F. 2d 149 (3rd Cir. 1956).....	38
<u>United States v. Jackson</u> 102 F. 2d 683 (2d Cir. 1939) cert. den. 307 U.S. 635, 123 A.L.R. 116.....	8

Page

<u>United States ex rel. Petrushansky</u> <u>v. Marasco</u> 315 F. Supp. 953 (S.P. N.Y. 1963) aff'd 325 F. 2d 562 (2d Cir. 1963) <u>cert. den.</u> 376 U.S. 952 (1964).....	21
<u>United States v. Portner</u> 462 D. 2d 678 (2d Cir. 1972).....	33
<u>United States v. Reidel</u> 126 F. 2d 81 (7th Cir. 1942).....	31
<u>United States v. Titus</u> 64 D. Supp. 55 (D. N.J. 1946).....	38
<u>United States v. Wernes</u> 157 F. 2d 797 (7th Cir. 1946).....	33
<u>Wacker v. Bisson</u> 348 F. 2d 602 (5th Cir. 1965).....	21
<u>Yordi v. Nolte</u> 215 U.S. 227.....	23

Page

Statutes:

Indian Penal Code Section 405.....	36
Indian Penal Code Section 409.....	3, 36
Indian Code of Criminal Procedure.....	3, 30
Extradition Document Authentication Statute 18 U.S.C. Sec. 3190.....	11
Extradition Hearing Statute 18 U.S.C. Sec. 3184.....	9
New York Penal Law §155.05.....	37
Accounting Generally for Public Money 18 U.S.C. §343.....	40

Authorities:

26 Am Jur. 2d Embezzlement §8.....	35
31 Am. Jur. 2d, Extradition §10.....	28
158 A.L.R. 1158.....	32

ISSUES PRESENTED FOR REVIEW

1. Did the court below exceed the mandate of this Court and violate the law of the case by making findings with respect to the intention of the appellant including intentions formed subsequent to his having left India?
2. Was the evidence sufficient to support the finding appellant left India for the purpose of avoiding prosecution?
3. Was the Government of India obliged to prove the appellant's intent beyond a reasonable doubt?
4. Did the Court below violate appellant's constitutional rights by denying his application for a stay to permit discovery and by permitting the introduction of depositions properly authenticated for use in extradition proceedings?
5. In a proceeding where the statute of limitations

was a critical element, did the court below commit irrevocable prejudice by a delay of fourteen months in deciding an application for a writ of habeas corpus?

6. Was the evidence of the alleged crime presented by the Government of India sufficient to establish probable cause with respect to all of the essential allegations?
7. Was there sufficient evidence to establish that extradition is being sought to try appellant in a crime or offense of a political character?
8. Is the statute of limitations a bar to appellant's extradition for all of the offenses set forth in the first two (2) charge sheets or to any of the acts alleged in the third charge sheet?

STATEMENT OF THE CASE

This international extradition proceeding is once again before this Court after having been remanded for findings of fact on the issue of appellant's intent in leaving India on July 26, 1966. On remand the Magistrate held adversely to appellant on this issue (A79). The District Court denied appellant's petition for a writ of habeas corpus and affirmed the decision of the Magistrate (A94).

Extradition of the appellant is being sought by the Government of India for the embezzlement of certain funds which had been administered by him. These acts of embezzlement resulted in three charge sheets being issued in New Delhi, India charging respondent with offenses punishable under Section 409 of the Indian Penal Code. The first charge sheet (A228) encompasses the period May 26, 1959 to and including April 7, 1960; the second charge sheet (A232) encompasses the period June 29, 1960 to and including May 16, 1961; and the third charge sheet (A152) encompasses the period July 14, 1961 to and including September 27, 1961. Three separate charge sheets were handed down so as to comply with the provisions of the Indian Code of Criminal Procedure (A153).

At the initial hearing, the Magistrate in his opinion (A20) made the following findings:

1. Between February 1959 and September 1961 "virtually all the fund of over \$400,000 was disbursed (A24).

2. Appellant was personally responsible for the administration, distribution and ultimate auditing, of the Fund.

3. No formal audit of the Naval Prize Fund account was ever made.

4. Many of the books and records of the Fund had been destroyed prior to 1966, preventing an audit.

5. Appellant had withdrawn the bulk of the account in cash.

6. Large sums of cash were deposited to several personal accounts of the appellant and cash was used by him to pay stock and commodity brokers.

7. A number of claimants were paid by money orders which were purchased by cash.

8. That appellant during the period in question had lost heavily in the stock market and in commodities, and

9. Appellant had personally ordered the destruction of the records of the Fund.

Additional evidence indicated that of the approximately 15,000 individuals entitled to share in the Fund, only approximately 1,959 checks were issued in amounts ranging from Rs. 100-300.

Others were paid through the issuance of postal money orders purchased for cash in bulk amounts (Prior record, Exhibit 15). The evidence also showed that many money orders and checks had been returned undelivered and that the registry of those undelivered monies, which had been maintained were among those records destroyed by the appellant (A214).

The Magistrate found that the evidence had been properly certified and was admissible pursuant to the extradition statute (A27). Upon such evidence, the Magistrate found that there was probable cause for extraditing appellant to India for trial.

Upon review of the Magistrate's decision and findings, the District Court (A41) found that there was sufficient evidence to show probable cause.

After this Court remanded the appellant moved to stay the taking of further evidence or in the alternative, for discovery. This application was denied by the District Court (A71). No appeal from this denial was taken by appellant.

The evidence developed at the initial hearing and on the remanded proceeding with respect to the issue of intent established that:

1. On November 10, 1965, Admiral Nair, Chief of Naval Personnel, concluded that no accounts existed with respect to the Naval Prize Fund and submitted a written report

to the Chief of Naval Staff to the effect that Jhirad had advised him that the records had been destroyed and that there were no accounts kept with respect to the Fund (A194, A197).

2. Thereafter, a confidential memorandum was submitted to the Ministry of Defense requesting that the matter be turned over for such investigation to the SPE (A199).

3. On February 19, 1966, the Central Bureau of Investigation was requested to commence an investigation concerning allegations that there had been mismanagement, and possibly embezzlement, from the Naval Prize Fund (A86, A96).

4. Efforts were made to determine the whereabouts of any relevant records and a search of the office of the Naval Law Directorate was conducted. In addition, inquiries were made of the staff. The appellant in a conversation with a Naval officer (A200) was informed that the records in question were needed in conjunction with the investigation conducted by the SPE.

5. On May 26, 1966, a subpoena duces tucem was issued to the Central Bank of India (A182) where the Naval Prize Fund account was maintained and where appellant maintained a personal account (A96).

6. An employee of the bank testified as to the receipt of said subpoena and to a conversation with the accused in June of 1966 wherein the witness made known to Jhirad that such a subpoena had been received (A180).

7. The case was officially registered with the Central Bureau of Investigation on July 2, 1966 (A87).

8. On five separate occasions either appellant or his wife disposed of various law books and other items of personal property. These transactions took place from June 28, 1966 to July 16, 1966 (A183-A193).

9. On July 26, 1966 appellant left India.

The District Court was of the opinion that the record would sustain a finding that the "intent to flee" to avoid prosecution was formed even prior to the time Jhirad left India (A98).

Pursuant to Article 6 of the Treaty (A107) the appellant has also attempted to create as an issue that his extradition is politically motivated. The Magistrate, however, found that his evidence was insufficient "to establish that prosecution and extradition are politically motivated" (A39). The District Court concluded that the Magistrate was correct in holding that appellant had failed to prove this contention. On this issue, the District Court reviewed the Magistrate's findings in his opinion as follows (A50-A51):

"The only evidence offered by petitioner in support of his argument was that Jhirad was an outspoken advocate of the State of Israel, in a country firmly committed to the Arab block, that certain Government officials had warned him about his activities; and that he was supposedly under surveillance by some

Government agencies. However, this along is not enough to demonstrate that this request for extradition is motivated by India's animosity to Jhirad's pro-Israel sentiments. Petitioner has shown no evidence regarding the circumstances of this investigation of Jhirad or his indictment in India, which shows political motivations. Indeed, as the Magistrate pointed out in his opinion, negating the inference of strong animosity toward Jhirad is the fact that at the very time he was allegedly chastised and under surveillance for his pro-Israel feelings, he held the highest civilian office in the Indian Navy; he was allowed to attend several World Jewish Conferences (in fact that was his destination on his final departure from India); and he was bestowed with the honor of designation as Senior Advocate by the Indian Bar Association. Petitioner has failed to prove that political motivation lurks behind this demand for extradition. Thus, it is clear that Article Six does not prohibit the extradition of Jhirad for his alleged offenses."

POINT I

THE DISTRICT COURT DID NOT
EXCEED THE MANDATE OF THE
COURT OF APPEALS

The Magistrate did not exceed the mandate of this Court which was to "make findings on the issue of intent".

The case was remanded to the District Court for further proceedings consistent with the requirements of the treaty and the extradition statute. 18 U.S.C. §3184.

While the entire opinion of the Magistrate (A79) must be read in its entirety, appellant's brief conveniently quotes portions of the Magistrate's conclusions out of context while ignoring his underlying findings. The brief (p. 14) thus quotes a portion thereof and states that "He found that, after Jhirad had been abroad for several months, he 'decided not to return to India, since he feared being prosecuted'" (A93). What the Magistrate did say was that "while away" he made this decision out of fear of prosecution. As a basis for this conclusion, however, it was found (A90) "that he was aware of the investigation, was concerned about it, and considered the possibility that he would not return to India even before he left for Brussels." [Emphasis added.] It was only the final decision that was deferred, the general intent to remain permanently away being formulated prior to leaving.

The District Court in review (A94) concluded that the Magistrate's findings were supported by the evidence and himself found that the Magistrate's finding as to when the final decision was made constituted "a solidified intent to flee to avoid prosecution" (A100).

In Donnell v. United States, 229 F. 2d 560, 565 (5th Cir. 1956) the Court held that:

"...in determining whether a person charged with crime will be denied the right to be protected by the statute of limitations, the purpose and intent of his absence is an important matter to be inquired into under the plain words of the statute and the decisions discussed."

If, as expressed in the Donnell case, *id.* at 562 "the general intention of the appellant in leaving the jurisdiction is material and is an indispensable aspect in considering whether he was, while outside the jurisdiction, a fugitive from justice.

then the Magistrate's findings fully satisfied the intent and purpose of this Court in remanding.

Other issues raised by appellant in his Point I as to procedure, discovery and the proper standard of proof are discussed at Points III and IV, *infra*.

POINT II

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT APPELLANT INTENDED TO LEAVE INDIA FOR THE PURPOSE OF FLEEING FROM PROSECUTION

On the remanded hearing, Magistrate Goettel, in an exhaustive review of the evidence, analyzed the chronology of events beginning with the commencement of an investigation by the Central Bureau of Investigation on February 19, 1966 and concluding with the movement of the appellant to Geneva, Switzerland on August 10, 1966 (A86-A87).

That evidence which was newly introduced by the Government of India on the remanded hearing was found by the Magistrate to have been properly authenticated pursuant to the provisions of 18 U.S.C. Sec. 3190 (A84-A86).

Appellant argues that the findings of the Magistrate must be set aside as being "clearly erroneous, and relies principally on the argumentative portion of the opinion wholly ignoring the findings made on the basis of the evidence." The Magistrate in concluding that appellant made his final decision not to return to India in the middle of September 1966 perhaps went beyond what was required of him. Such a finding, however, in no way detracts from his finding on intent as supported by the substantial weight of the evidence. A careful reading of this opinion (A79) discloses that the Magistrate found that

appellant was "aware of the pending investigation, was concerned about it, and considered the possibility that he would not return to India even before he left for Brussels" (A90); that the trip to Brussels was "an opportune time for appellant to leave India without creating any undue suspicion, to re-appraise his situation when out of India without immediately committing himself to a course of action, and to defer making a decision on returning to India until necessary." (A90-A91) Finally, the Magistrate concludes that "while away, he decided not to return to India, since he feared being prosecuted" (A93). Since the determination to be made was whether or not the applicant was fleeing from justice, the fact that he knew of an impending prosecution, that he feared such prosecution if he remained in India, and his departure from his native country with that knowledge, never to return, is sufficient to toll the statute of limitations.

That appellant had another reason for leaving India is relevant only in that it provided a convenient cover so as not to arouse suspicion. It is only significant that he did not return because of fear of prosecution after having left with the knowledge that he was in jeopardy. This Court in its prior opinion (A62) clearly enunciated the standard to be applied:

"It does not appear to us to be unreasonable to provide for tolling of the statute of limitations when a person leaves the place of his alleged offense to avoid prosecution of arrest and for not tolling the statute when a person without such purpose of escaping punishment merely moves openly to another place of residence."

In Donnell v. U.S., 229 F. 2d 560, 562 (5th Cir. 1956)

it was stated that:

"Nevertheless, it was clearly recognized that the general intention of the defendant in leaving the jurisdiction is material and is an indispensable aspect in considering whether he was, while outside the jurisdiction, a fugitive from justice."

The District Court sitting in review determined that the evidence was sufficient to support the Magistrate's conclusions and independently concluded that the appellant is extraditable with the following comment:

"Had I been the trier of the facts, I would perhaps have determined that the "intent to flee" to avoid prosecution was formed even prior to the time appellant left India. There is substantial evidence in the record to indicate that appellant knew that he was under investigation prior to that date" (A98).

"I have concluded, therefore, that Magistrate Goettel would be well within the evidence had he concluded that Jhirad had formed the necessary intent to flee prosecution at the time he left India on July 26, 1966. But it is not my province to try the matter de novo; it is sufficient for me to determine whether the conclusions of the Magistrate are supported by the evidence. In this it must be said that it is clear that the Magistrate was most fair" (A100).

Returning to the Magistrate's specific findings, it is clear that having found that appellant left India under the circumstances of being the object of an investigation of which he was aware, the Magistrate felt compelled to make a determination from the evidence as to the exact workings of the appellant's mind. In so doing, a finding was made

as to appellant's intentions formulated subsequent to his departure, although the findings as to his intention in leaving were alone sufficient to toll the statute of limitations. It is the ultimate actions, however, which shed light on appellant's initial intentions.

From the time of his leaving the country, the appellant immediately became a fugitive of justice and the efforts of the Government of India in seeking to locate his whereabouts should not be discounted. Although steps had been taken to prevent the issuance of a passport, this was successfully overcome by the appellant (A202). The Government's efforts ended with the information obtained on January 13, 1972 that appellant had entered the United States on June 2, 1971 (A203). It is not unreasonable to assume that appellant was aware of these efforts.

As was stated by the Court below

"to fully ascertain the question of intent, one must examine the operation of another man's mind which is always a difficult problem for a finder of fact" (A101).

Thus, one must always determine an individual's intentions after he has already left his usual place of residence. The statute is tolled when it is established that the departure was with knowledge of an impending criminal investigation and fear of prosecution and the fact that the fugitive may harbor a secret desire to possibly return, thereby leaving his options open until the outcome of

the investigation does not give him the benefit of the statute. The formation of a final intention does not in any way detract from the original reason for fleeing and as stated above, the fact that appellant was found by the Magistrate to have formed such final intent subsequent to his departure from the country was not significant to the crucial issue before him.

Turning to the evidence, it is apparent that the appellant had knowledge of the investigation of the handling of the Prize Fund from no less than three individuals, Admiral Nair (A196), Commander Swamy (A201), and Mr. Mathur (A180). The evidence establishes beyond a doubt that there was indeed an investigation and that such investigation was triggered by the report of Admiral Nair in November 1965 (A197) and thereafter expanded until the case was formally registered for criminal investigation in July, 1966. The nature of the inquiry into the Prize Fund would thus inexorably be directed towards the individual vested with responsibility for the administration of the Fund. The appellant's denials of any conversations or of any knowledge of such an investigation totally lack credibility.

Even appellant's explanation of his departure and subsequent decision not to return must be considered in the light of the events occurring at the time he left the country. His testimony is inconsistent with the actions of a man

totally innocent and unaware of the fact of an impending prosecution. On direct examination he testified as follows (A169-A170):

"Q. Did you leave any cash in India?

A. Yes, I had some cash which was left which must have been about 30 or 40 thousand rupees; I left it with my sister.

THE MAGISTRATE: I have forgotten the value of a rupee in terms of a dollar. Will you give it to me.

MR. SADOWSKY: Well, it depends on which exchange rate. Using the exchange rate at that time?

THE MAGISTRATE: At that time.

THE WITNESS: At that time it was about four and a half a piece to a dollar or five a piece to a dollar.

Q. That would be about --

A. About \$10,000.

Q. Incidentally, you were practicing law at that time?

A. Yes, sir, very much practicing law at that time.

Q. Did you adjourn any of your cases in view of the trip?

A. Yes, when I came to know I was going, in the month of June itself when most courts proceed on vacation, I had all my cases adjourned until after the middle of October."

All of appellant's cases were ultimately left to a "junior counsel" who was told that he could retain the fees and handle these cases (A175-A176) which were still active at the time he left India.

The appellant's subsequent movement from country to country also belies his assertions that the decision was made without knowledge of the investigation which was to lead to his implication.

He purportedly left in July 1966, to attend a conference in Brussels which, according to the testimony, lasted nine to ten days (A185). The last such meeting attended by him was in 1961 so that his departure at this time was hardly routine.

"Q. Now, when did you first attend a meeting of a World Jewish Conference?

A. The first time I attended a meeting of the World Jewish Congress was sometime in April of 1957 in London.

Q. After April, 1957 how many meetings of the World Jewish Congress did you attend?

A. I attended again in 1959. That was the plenary session of the World Jewish Congress which was held in Stockholm. I think I attended a council meeting in 1960 of the Congress and perhaps again in 1961; then again in 1966.

Q. So that there were three to four meetings before 1966 that you attended; is that correct?

A. That's correct." (A167)

He then went to Geneva, Switzerland, where he remained till the summer of 1967. He thereafter departed for Israel where he became a citizen and then immigrated to the United States (A114). Such extraordinary transitory movements are not consistent with the actions of a highly respected attorney who had been Judge Advocate of the Navy; had a successful law practice of international dimensions (A117); who had maintained a home for many years and who prior thereto was an individual with fixed habits and a high degree of stability. The appellant on the other hand suddenly leaves his native land, leaving behind a good portion of his furnishings, at least \$10,000 in the bank and turns over a lucrative law practice to a junior counsel without any provision being made for the disposition of the many cases allegedly handled by him or of any part of the fees to inure to his benefit.

A reasonable man, being unaware of any criminal investigation, would have returned to his country to dispose of his affairs in an orderly manner. The appellant's actions, however, were not those of an innocent person but were rather the actions of a fugitive from justice who did not dare return because of his knowledge of possible prosecution for acts of embezzlement engaged in by him against his government.

The appellant's answer to the foregoing consisted only of a denial of any knowledge of the investigation into the Prize Fund and his own self-serving statements as to the circumstances leading to his decision not to return. No other evidence was introduced. It is interesting to note that appellant gave as his reason for not returning to India the political pressures caused by his position on India's relations with Israel. The Magistrate, however, had rejected any claim of political persecution and found that the evidence supported a contrary conclusion (A39). This finding was concurred in by the District Court (A51).

The factors to be considered in determining the intentions of one alleged to be a fugitive from justice would include the pattern of living established over a long period of time and any abrupt changes in such patterns which go unexplained. In Brouse v. United States, 68 F. 2d 294, 296 (1st Cir. 1933) the Court's inquiry into the defendant's intent included a finding that "there was a striking change in defendant's habits as to his customary places of resort" which led to the conclusion that defendant was in fact a fugitive. As was also held:

"The essential characteristic of fleeing from justice is leaving one's residence, or usual place of abode or resort, or concerning one's self with the intent to avoid punishment" (Id. at 295).

It is respectfully submitted that the record as it stood prior to the taking of additional evidence supported

a finding that the appellant fled to avoid prosecution. As supplemented by the additional evidence adduced at the remanded hearing the requisite intention is clearly established and fully supports the findings that (1) appellant had knowledge of the impending investigation, (2) he abruptly changed his habits without satisfactory explanation and (3) he fled to avoid the justice of the Republic of India thereby becoming a fugitive.

The specific finding by the Magistrate that appellant's final decision not to return was made in the middle of September, 1966 also finds support in the evidence as was found by the District Court (A100).

The District Court was correct in determining that the Magistrate's finding on the issue of intent was well documented and should not be overturned (A101).

The scope of inquiry on the issue of probable cause is extremely narrow being limited to the following questions (A59):

- "1. Whether the Magistrate has jurisdiction;
2. Whether the offense alleged is a treaty offense, and
3. Whether there was substantial evidence produced at the hearing to support the Magistrate's determination that there were reasonable grounds to believe the accused guilty of the alleged offense.

Wacker v. Bisson, 348 F. 2d 602 (5th Cir. 1965);
Sayne v. Shipley, 418 F. 2d 679 (5th Cir. 1909),
cert. den. 398 U.S. 903 (1970); U.S. ex rel
Petrushansky v. Marasco, 315 F. Supp. 953 (S.D.N.Y.
1963), aff'd 325 F. 2d 562 (2nd Cir. 1963) cert.
den. 376 U.S. 952 (1964)."

The findings of the Magistrate and the District Court
on the issue of intent should not be disturbed.

POINT III

THE PROPER STANDARD OF PROOF
FOR ISSUES ARISING IN THE
CONTEXT OF THIS INTERNATIONAL
EXTRADITION PROCEEDING IS
PROBABLE CAUSE

The defense of the statute of limitations is not available as of right in international extradition proceedings. All rights which a fugitive enjoys under the provision of a particular treaty are contractual in nature and this defense is available only if conferred upon a fugitive by the parties nations to the treaty. It is the treaty from which all substantive and procedural rights are to be determined. 18 U.S.C. §3184 (All3) directs that if on a hearing the Magistrate "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention" his findings shall be certified to the Secretary of State. Thus all matters under the treaty are within the exclusive province of the Magistrate and his findings are reviewable only to a limited extent on habeas corpus. McNamara v. Henkel, 226 U.S. 523 (1912).

The appellant's efforts to engraft a standard of proof other than what has been established by treaty and statute is inconsistent with the proposition that treaties are to be liberally construed in favor of the rights of the parties. As was held in Factor v. Laubenheimer, 290 U.S. 276, 293 (1933):

"In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. Jordan v. Tashiro, 278 U.S. 123, 127; Geofroy v. Riggs, 133 U.S. 258, 271; in re Ross, 140 U.S. 453, 475; Tucker v. Alexandroff, 183 U.S. 424, 437; Asakura v. Seattle, 265 U.S. 332. Unless these principles, consistently recognized and applied by this Court, are now to be discarded, their application here leads inescapably to the conclusion that the treaties, presently involved, on their face require the extradition of the petitioner, even though the act with which he is charged would not be a crime if committed in Illinois.

"Other considerations peculiarly applicable to treaties for extradition, and to these treaties in particular, fortify this conclusion. The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as criminal at the place of asylum, involves no impairment of any legitimate public or private interest. The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, see 1 Moore, Extradition, §40, should be construed more liberally than a criminal statute of the technical requirements of criminal procedure. Grin v. Shine, 187 U.S. 181, 184; Yordi v. Nolte, 215 U.S. 227, 230. All of the offenses named in the two treaties are not only denominated crimes by the treaties themselves, but they are recognized as such by the jurisprudence of both countries" (id. at 298).

In the spirit of international cooperation the imposition of procedural or evidentiary burdens not set forth in the treaty should not be imposed on either of the contracting parties.

If we are to follow the extradition procedures mandated by both treaty and statute then the standard for review of the Magistrate's decision in this remanded hearing must be similarly determined by traditional rules as established by the authority cited herein. It is not within the province of the judiciary to direct a standard of proof in the presence of a clear statutory mandate.

As was stated in Brouse v. United States, 68 F. 2d 294, 296 (1st Cir. 1933):

"We cannot say that Judge Hale's finding that it was prompted by a purpose to evade arrest and prosecution was unwarranted or unreasonable. His decision on the plea on abatement must stand."

The appropriate standard of proof in an extradition hearing being probable cause the Government of India has shown more than required by meeting the burden established by the Magistrate as being a preponderance of the credible evidence. Under the probable cause standard the appellant's testimony which served to contradict the evidence of the demanding country was inadmissible and should not have been considered by the Magistrate.

Appellant further argues that his interest in this proceeding should be equated with that of a defendant in a criminal proceeding. There is, however, no threat of deprivation of liberty since this proceeding cannot result in conviction. The only penalty here is the requirement to stand trial for the offense charges. Therefore, there is no justification for employing the criminal trial standard of proof in an extradition proceeding.

Appellant also claims erroneously that the statute of limitations issue will be finally decided in this proceeding. Although India has no specific period of limitations in its Criminal Code that issue would be available to appellant under the decisional law of that country. In Assistant Customs Collector-Bombay v. Melwani (2 S.C.R. 438, 474, 1968), the Supreme Court of India wrote:

"The question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint. Hence we see no substance in the contention that the prosecution should be quashed on the ground that there was delay in instituting the complaint." [emphasis added.]

"Q. Is there any statutory provision which would bar prosecution under any theory of law?

A. No.

Q. Let's say, for example, under the theory of laches, unreasonable delay.

A. No, even on that score the prosecution cannot be barred. It's only after the trial is over that the Court can consider if the accused has been handicapped in his defense on account of lapse of time and considering the whole picture together, the Court might consider that the accused is not guilty on merits of the case."

This was adopted by the Magistrate in his findings on the first hearing (A89).

Domestic criminal trials resemble the above described Indian proceeding in that the defense of the statute of limitations is interposed under a plea of not guilty and must be determined at a trial in which conviction could mean loss of liberty. People v. Reynolds, 214 App. Div. 21 (2d Dept. 1925). In an extradition proceeding the statute of limitations is interposed, however, only as a defense to the extradition and has no bearing on guilt or innocence.

Thus, the question of delay may be utilized by appellant at the full trial in India by way of defense. It is important, however, that he be brought before the bar of justice so that his guilt or innocence may be determined.

POINT IV

APPELLANT HAS NOT BEEN DENIED
A FAIR HEARING CONSISTENT WITH
THE PROCEDURES APPLICABLE TO
EXTRADITION PROCEEDINGS

In order to establish a denial of procedural due process, appellant argues that the remanded proceedings should have been qualitatively different from a traditional extradition proceeding, thereby dismissing that body of procedural law which has been held to apply. Appellant bases this distinction on the mistaken theory that the statute of limitations is to be considered as a jurisdictional issue in a habeas corpus proceeding. It is, however, only an affirmative defense whether in the context of a civil or a criminal proceeding. People v. Reynolds, *supra*. Appellant's attempt to bifurcate the extradition proceeding further ignores the fact that the defense of the statute of limitations was incorporated by the two parties into the extradition treaty and that apart from the treaty it has no application. The only jurisdictional questions are whether there is an existing treaty and whether the offense charged is extraditable. Both of these issues have been decided against the appellant. The remanded proceeding was therefore subject to the same procedural limitations as any aspect of that proceeding arising out of the treaty.

Appellant also argues that he was entitled to discovery. Viewing the proceeding in its entirety this claim would seem to have no legal basis. "The restriction imposed by the due process clause of the Fourteenth Amendment to the Federal Constitution has no relation to the subject of international extradition for crime as regulated by treaty."

31 Am.Jur 2d, Extradition §10.

As to any claim of denial of a fair hearing, the issue of the statute of limitations was raised by the appellant at the very outset of this proceeding. It was decided initially by the District Court in January 1973 (A3). Appellant nevertheless testified as to his reasons for leaving India during the course of the first hearing before the Magistrate in March, 1973 (A136, A137, A167). Nine months later his testimony was essentially the same, consisting only of a denial of any knowledge of the investigation of his activities with respect to the Prize Fund. On the other hand, those circumstances which formed the government's case in establishing intent were not denied, and to some extent were admitted by appellant. There was no denial for example, that he sold his books, left his law practice, left \$10,000 in cash, and left his home, servants and furnishings (see discussion of the evidence at Point II, *supra*).

As further argument for expanding the scope of this proceeding, appellant raises the point that the issue of

"intent" will never receive a full trial in India. As discussed in Point III of this brief, this issue will indeed be available to appellant at the trial and would go to the merits of the case against him to be considered in determining guilt or innocence.

The issue of appellant's right to discovery, therefore, was correctly decided by the District Court on his application for a stay of the remanded proceeding (A71). Appellant did not appeal from the denial of this application.

Appellant's protestations notwithstanding, he has been afforded every procedural safeguard consistent with the requirements of applicable law including the extradition treaty of the Republic of India.

POINT V

THE STATUTE OF LIMITATIONS IS NOT A
BAR TO THE EXTRADITION OF APPELLANT
FOR ALL OF THE OFFENSES SET FORTH
IN THE THREE (3) SEPARATE CHARGE SHEETS
FILED UNDER INDIAN CRIMINAL PROCEDURE

Under Indian law the entire scheme would be treated
as one offense. Indian Code of Crim. Proc. (A153):

"235. (1) If, in one series of acts so connected
together as to form the same transaction, more
offenses than one are committed by the same per-
son, he may be charged with, and tried at one
trial for, every such offense."

As a matter of procedure each charge must include
offenses occurring within a twelve-month period, §222 of
the Indian Code. However, an accused may be tried at one
trial for up to three such charges (§234). Inasmuch as it has
been established that there is no applicable statute of
limitations under Indian Law, that defense would not bar
the prosecution of the appellant herein for acts set forth
in each of the three charge sheets filed against him. The
Government's expert witness testified (A156-A159) as to the
application of the Indian procedure in this regard, specifically
stating that appellant is prosecutable on all charges. It
is the procedural law of India which requires that separate
"charge sheets" relate only to acts occurring within a one-year
period. Three separate "charge sheets" can be tried together

as one offense §234 (Al53).

The case of Tewari v. Emperor (attached hereto) is authority for the proposition that under Indian law separate acts of embezzlement can be properly charged and tried as one offense. Thus, the separate charge sheets are to be treated as one offense even for purposes of any applicable statute of limitations. The tolling of the statute therefore, related back to the date of the first such act contained in any charge.

If an indictment had been returned against appellant in this jurisdiction for the same criminal acts alleged to have been committed in India, they would comprise a continuing offense under both federal and state decisions so that the statute of limitations would commence to run from the date the scheme was ended. As stated in People v. Kirk, 6 2M. 2d 1078, 1080 (1969):

"There is ample authority for charging a defendant with a single continuous crime for a course of conduct over a period of time which comprises the commission of any criminal acts of the same nature motivated by a single common illegal intent or forming part of a general plan or scheme. (Cases cited)"

And in United States v. Reidel, 126 F. 2d 81, 83 (7th Cir. 1942):

"A fraudulent scheme would hardly be undertaken, save for profit to the plotters. Avoidance of detection and prevention of recovery of money lost by the victims are within, and

often a material part of, the illegal scheme. Further profit from the scheme to defraud, as such, may be over, and yet the scheme itself be not ended."

Reference to the procedural law of India on the issue of continuing offenses is inappropriate and it is submitted that both the Magistrate and the District Court erred as to that point.

The general rule of American jurisprudence in this area is that:

"the period of limitations against prosecution for the crime [of embezzlement] is usually deemed to commence running at the time of the wrongful diversion or act of misuse, or, if the process is continuing in nature, at the time of the last of such acts." 158 A.L.R. 1158. (Emphasis supplied.)

In New York, the law is settled that:

"where property is stolen from the same owner and from the same place in a series of acts, those acts constitute a single larceny regardless of the time elapsing between them, if the successive takings be pursuant to a single intent and design and in execution of a common fraudulent scheme." People v. Cox, 286 N.Y. 137 (1941).

The larcenies can extend over a period of years. Id. at 142. And the statute of limitations begins running at the last date of the offense. See People v. Hines, 283 N.Y. 93; People v. Kirk, supra; People v. Gold Key Club, 2 Misc. 2d 380, app. dismissed 23 A.D. 740 (1956).

Insofar as the instant case is concerned, it is clear that Jhirad's scheme was hardly completed at the date the September 27, 1961 check was drawn. Rather, his every activity with regard to the Naval Prize Fund was designed to conceal the detection of the misappropriation as is shown by the evidence.

The closing of the Prize Fund account in August 1964 is one such act as is the destruction of all records pertaining thereto. As the Circuit Court in United States v. Wernes, 157 F. 2d 797, 799 (7th Cir. 1946) held:

"There is ample evidence to indicate a continuation of activities designed to prevent too much complaint or inquiry even after attempts to obtain further money from the limited partners had ceased, and the mailings fall within this period of continued activity and cannot be said to be not in furtherance of the scheme."

The appellant would thus be triable for each alleged act of embezzlement by the Federal or New York courts. The entire scheme would be the subject of one single indictment under our procedure and therefore no part thereof would be barred by the statute of limitations. United States v. Portner, 462 F. 2d (2nd Cir. 1972).

POINT VI

THE EVIDENCE WAS SUFFICIENT TO
ESTABLISH PROBABLE CAUSE WITH
RESPECT TO ALL THE ESSENTIAL
ELEMENTS OF THE CHARGE

Appellant maintains that the issue of probable cause was not decided on the first appeal (A62), and again challenges the findings of the Magistrate on this appeal. The basis of the challenge has, however, been narrowly formulated to focus upon the one allegation of the charge sheets found by the Magistrate to be unsupported by the evidence. The specific language of the charge sheet upon which appellant bases this aspect of his appeal is that:

"Some of the Naval personnel who were entitled to a share of the Prize Money have, on being examined, stated that they did not receive their share of Prize Money." (A152) (emphasis added)

In fact, this allegation was fully supported by the evidence submitted at the initial hearing. The depositions in support of this factual allegation were part of the record before the Magistrate in India and were introduced in evidence before the Magistrate during the course of the extradition proceeding as Exhibit 6. In addition, the Magistrate had before him the letter addressed to the Chief of Naval Staff from a former sailor in which mention is made of repeated requests for his share of the prize money (A211). Appellant adopted the informal procedures for the administration of the fund, and

claimants had been paid as late as December 1961 (the Fund being established in 1958) (A64). These depositions would be some evidence that persons rightfully entitled to share in the Fund did not receive payment. Nevertheless, both the Magistrate and the District Court correctly held that it was not necessary to show that a particular claimant did not receive his payment. The other evidence clearly established probable cause without the necessity of having proved this additional fact.

Under the circumstances of this case, it is, in fact, unnecessary to allege specifically who the true legal owner of the embezzled property might be. 26 Am Jur. 2d Embezzlement §8. Ownership need not be absolute and if the Government of India had only "a qualified or special property in the goods embezzled, it will be sufficient." State v. Nelson, 362 Mo. 129, 240 S.W. 2d 140, 142 (Sup. Ct. 1951). The only reason for including an allegation of ownership in an indictment is properly stated in the Nelson case, *id.* (p. 142):

"The purpose of charging ownership is to show that the title of ownership is not in the accused, as he cannot be held for converting his own property, also to bring notice to the accused of the particular offense for which he is called to answer and to bar subsequent prosecution of the accused for the same offense."

The Government of India's interest in the protection of this Fund which has been entrusted to the appellant satisfies any possible requisite that there be a party whose property or interest in property is converted.

Yet, appellant now attempts to distort the plain meaning of the words of the allegation set forth in the charge sheet to make it appear that this was an essential element of the charge whereas it was in fact not a substantive element of the crime. The embezzlement is alleged in the charge sheets as follows: (A152, A233, A235)

"The investigation has revealed that while a part of the withdrawals was made by way of issue of individual cheques to some of the entitled personnel and by transfer of amounts to the Post Master, New Delhi G.P.O. mainly for issue of Money Orders to some other entitled personnel the major portion of the amount, was withdrawn in cash from the said Naval Prize Fund account through 91 cheques signed by Shri E.E. Jhirad, accused, as Administrator of the Fund and countersigned by Shri P.L. Sharma as the Secretary of the Fund. The investigation has further revealed that Shri E.E. Jhirad, accused, personally received various amounts withdrawn in cash from the Naval Prize Fund at the Bank's counter.

"The investigation further revealed that Shri E.E. Jhirad, accused, having withdrawn large amounts in cash from the Naval Prize Fund account during the aforesaid period deposited or caused to be deposited various amounts in his personal account with the National & Grindlays Bank Ltd., Lloyds Branch, period 24.7.61 to 27.9.1961 Shri E.E. Jhirad, accused, being entrusted with property or dominion over property viz. The Naval Prize in his capacity as Public Servant and Administrator of the said Fund, committed criminal breach of trust in respect of Rs. 59,000."

It is these allegations which constitute the essential elements charging appellant with the crime of criminal breach of trust (embezzlement) under Section 409, Indian Penal Code.

Section 405 Indian Penal Code defines criminal breach of

trust as follows:

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust"."

In New York State, the former offense of embezzlement is embraced under the general term "larceny". New York Penal Law §155.05 provides:

"1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in Subdivision One of this section, committed in any of the following ways:

(a) by conduct heretofore defined or known as ... embezzlement."

The crime of embezzlement is committed when a person who, having money or property in his possession as a bailee, agent, attorney, custodian, etc., appropriates such money or property to his own use or the use of other than the lawful owner. People v. Gibson, 218 N.Y. 70 (1916).

The element of intent may be "proved directly; or it may be inferred from the circumstances of the case as disclosed by the evidence; or it may be inferred from the

nature of the conversion itself." Dobbin v. U.S., 157 F. 2d 257, 259 (D.C. Cir. 1946).

It has also been held that on the issue of intent:

"There must be a criminal intent, but this intent must, of necessity, be gathered from the acts of the agent and the circumstances surrounding the particular case, rather than from his express declarations, and if the agent knowingly appropriates money belonging to his principal . . . it is embezzlement within the spirit as well as the letter of the law, for when one knowingly appropriates money belonging to another to his own private use, the law presumes a crime of intent." National Life and Accident Insurance Co. v Gibson, 101 S.W. 895, 897, 41 Ky. Law Rep. 101, 12 L.R.A., N.S. 717, quoted in United States v. Titus, 64 D. Supp. 55 (D.N.J. 1946)."

On the foregoing authority, the Magistrate correctly held that "criminal intent can be inferred from the nature of the conversion" (A29).

On proving inconsistent dominion, the Ninth Circuit has stated.

"Clearly, evidence of large expenditures or the acquisition of large unexplained sums of money, during the time charged as that during which the embezzlement took place is some evidence of such embezzlement." Hansberry v. United States, 295 F. 2d 800, 807 (9th Cir. 1961) citing United States v. Howell, 3 Cir. 1956 240 F. 2d 149, 158; Hansborough v. United States, 8 Cir. 1946, 156 F. 2d 327, 329; United States v. Jackson, 2 Cir., 1939, 102 F. 2d 683, 684 123 A.L.R. 116, cert. den. 307 U.S. 635; 1 Wigmore on evidence (3d ed.) §154."

See also: People v. Robinson, 284 N.Y. 75 (1940).

It seems clear that appellant's deposits of the prize fund monies in his own personal accounts constituted dominion inconsistent with his scope of authority as delegated by the Indian Government. Not only did he make unauthorized deposits but he used the funds directly for stock market transactions (A24). Thus, sufficient evidence had been adduced to meet the burden of establishing probable cause which pertains in extradition hearings.

As appears from the opinion of the committing Magistrate, an exhaustive review of the evidence and testimony was made before reaching his decision (A20).

A further telling circumstance which is evidence of appellant's scheme is that the monies charged to him for administration and disbursement constituted a non-public fund. There was evidence (A218) defining the difference between a so-called public fund and a non-public fund. This evidence established that in the Naval establishment, such a fund as was administered by appellant, was subject to audit procedures established by official Navy Order (A221). It was to have been administered by Naval officers in their official capacity. Proper administration included the maintenance of accounts and periodic auditing thereof.

It is significant in this regard, that 18 U.S.C. §643 provides that an official of the United States who

fails to render accounts for public monies is guilty of embezzlement. This section is set forth in full as follows:

"Section 643--Accounting generally for public money. Whoever, being an officer, employee or agent of the United States or of any department or agency thereof, having received public money which he is not authorized to retain as salary, pay or emolument, fails to render his accounts for the same as provided by law is guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 726."

Appellant also attacks that portion of the Magistrate's opinion which discusses the possible methods of embezzlement which could have been utilized by the appellant other than the actual failure to pay those individuals who had submitted written claims. The Magistrate by doing this, was simply responding to appellant's argument, which is now being urged on appeal, that it was essential to establish that individual claimants had not been paid. This is not necessary inasmuch as the evidence sufficiently established appellant's exercise of dominion over the Fund. Furthermore, the circumstances under which the Fund was administered by the appellant clearly established a scheme to misappropriate the monies to his own use. For example, the evidence that money orders as well as checks which were undelivered had been returned, is sufficient to establish that the entire Fund had not been disbursed.

A record of the undelivered money orders and checks had been kept. These records, however, were among those destroyed by the appellant.

Tinsley v. Bauer, 271 P. 2d 110 (Calif. 1954) and People v. VonCseh, 9 A.D. 2d 660 (1st Dept. 1959) cited in appellant's brief (pp. 47 and 52) have been distinguished by the Magistrate and the District Court. Tinsley at A28 and Von Cseh at A29, A55.

In crimes of this type, it is not always possible to determine the exact method of embezzlement employed. This was recognized in Fernandez v. Phillips, 268 U.S. 311, 314 (1925) in the following language:

"As the taxpayers were not very prompt in calling for their papers, it was possible for him to keep their manifestations for a time without charging it himself, withdraw the amount with which he should charge himself for them and present an account that was correct upon its face. By repeating the process, it was possible to disguise and embezzlement for a considerable time. This is what from his books he seems to have done. It is unnecessary to go into greater detail."

Similarly, in Parnell v. State, 339 S.W. 2d 49, 54 (Texas Court of Criminal Appeal, 1959) the Court upheld an embezzlement conviction while admitting the State's inability to prove the exact mode of theft.

"There is no settled mode in which appropriation of money or property...must take place. It may occur in numerous ways and the appropriation consummated in any manner capable of effecting it."

It is in the nature of the crime that it must be proved ultimately by circumstantial evidence, since the absolute proof is exclusively in the hands of the embezzler, originally entrusted with the funds.

In any event, the issues raised by appellant as to ownership and dominion should be left to the trial. In People v. Reynolds, 214 App. Div. 21 (2d Dept. 1925), it was held that where in doubt the issue of ownership is one for resolution by the jury.

As to the body of the evidence submitted below, it was the finding of the Magistrate that books and records had been destroyed so there could be no audit; appellant had drawn substantial sums from the fund in cash; that during the times these withdrawals were made, large sums of cash were deposited in his personal accounts and paid over to stockbrokers and commodity brokers; that appellant had lost heavily in investments; and that he had personally ordered destruction of books and records (A24, A26). The District Court concurred with the Magistrate's findings:

"I hold that there was evidence as to all the elements material in showing the crime of embezzlement and that there is reasonable ground to believe that the petitioner is guilty of that crime" (A54).

In an extradition proceeding, the scope of review of the Magistrate's decision and findings is very limited.

This issue has come before the United States Supreme Court on several occasions and that Court has been consistent in its holding. In McNamara v. Henkel, 226 U.S. 523, 524 (1912) it was held that:

"...the role is well established that if the committing Magistrate has jurisdiction of the subject matter and of the accused, and the offense charged is within the treaty and the Magistrate had before him legal evidence on which to exercise his judgment as to the sufficiency of the facts to establish the criminality of the accused for the purposes of extradition, his decision cannot be reviewed on habeas corpus."

Similarly, in Fernandez v. Phillips, *supra*, 312, it was held that:

"That writ as has been said very often before cannot take the place of a writ of error. It is not a means of rehearing what the Magistrate already has decided. The alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the Magistrate had jurisdiction, whether the offense charged is within the treaty, and by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."

The test therefore is whether there was any evidence to warrant the finding that there was reasonable ground to believe the accused guilty. The requirements of the treaty have been met and it is not the province of this Court to now review the entire record to redetermine what the committing Magistrate has already found. Jimenez v. Artisteguieta, 311 F. 2d 547 cert. den. 373 U.S. 914 (5th Cir. 1962).

POINT VII

APPELLANT HAS NOT SUSTAINED HIS
BURDEN OF PROVING THAT THE OFFENSE
FOR WHICH EXTRADITION IS SOUGHT IS
ONE OF POLITICAL CHARACTER

Appellant has urged as a defense to the extradition that the Government of India seeks his return for reasons other than to stand trial for the crime charged. No competent evidence of this has been placed on the record. The only conclusion which one can properly draw from the testimony is that appellant's position with respect to certain aspects of his Government's foreign policy was contrary to its official position. No connection has been made, however, to the indictment for criminal breach of trust so as to prevent appellant's extradition.

The treaty is very clear on this point. Article 6 thereof reads as follows (A107):

"A fugitive criminal shall not be surrendered if the crime or offense in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offense of a political character."

It is therefore clear that the demanding country herein does not seek surrender of the fugitive for commission of any political offense.

As to the second breach of Article 6, no evidence has been introduced which would require a finding that the

Government of India seeks his surrender for the purpose of trying appellant for a political offense rather than for the acts for which he has actually been charged. Nevertheless, it is submitted that as to this latter portion of Article 6, the decision to withhold extradition on this ground lies with the executive branch of the Government which is charged with implementing the foreign policy of the United States. Pursuant to 18 USC 3184 the requisition for the surrender of a fugitive must be made to the Secretary of State and any decision on the political motives of the demanding country must be deferred to his judgment on the matter subsequent to the conclusion of these proceedings.

The Magistrate properly concluded that "the evidence is insufficient to establish that prosecution and extradition are politically motivated" (A39). This finding as affirmed by the District Court (A50) is conclusive and cannot be disturbed.

CONCLUSION

The order of the District Court denying the petition for a writ of habeas corpus should be affirmed and appellant should be held extraditable.

Respectfully submitted,

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CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Mookerjee.

SAT NARAIN TEWARI
v.
EMPEROR.*

1905
July 20.

Criminal breach of trust—Charge—Misjoinder of charges—Statement by accused—Confession—Admission—Evidence, admissibility of—Criminal Procedure Code (Act V of 1898) ss. 164, 202, 222, 234, 364.

followed
9.4.833 All. 36

An accused was tried for criminal breach of trust in respect of three distinct sums, and one charge was drawn up specifying all the three sums and the persons from whom he collected them.

He was not charged with three offences, but with one offence under s. 409 of the Penal Code, and was convicted of one offence and sentenced to one term of imprisonment:—

Held, that the charge as framed was not contrary to law, it being in accordance with ss. 222, sub-s. (2) and 234 of the Code of Criminal Procedure.

Emperor v. Gulzari Lal(1), Samiruddin Sarkar v. Nibaran Chandra Ghose(2) and Emperor v. Ishtiaq Ahmad(3) referred to.

Subrahmanya Ayyar v. King-Emperor(4) distinguished.

An admission or confession made before a Magistrate carrying on an inquiry under s. 202 of the Criminal Procedure Code, is not a statement recorded under s. 164 or 364 of the Code, and is therefore not admissible in evidence against the accused without further proof.

RULE granted to Sat Narain Tewari, the petitioner.

The petitioner, Sat Narain, who was the head or collecting member of the *Panchayet* of a village in the Jehanabad subdivision, was charged with embezzlement of three distinct sums of money, viz., Re. 1-11 and Rs. 5 collected on the 5th August 1904, and Re. 1-3 collected on the 20th May from three different persons, as chowkidari tax.

* Criminal Revision No. 644 of 1905, against the order of C. E. Pittar, Sessions Judge of Gaya, dated June 5, 1905.

(1) (1902) I. L. R. 24 All. 254.

(3) (1904) I. L. R. 27 All. 69.

(2) (1901) I. L. R. 31 Cale. 9-8.

(4) (1904) I. L. R. 25 Mad. 61.

1905.
 SAT NARAIN
 TEWARI
 v.
 EMPEROR.

Sat Narain was succeeded in office by one Raghuandan who complained before the Subdivisional Magistrate of Jehanabad, alleging that Sat Narain had misappropriated the chowkidari-tax realised by him from several villagers.

The Subdivisional Magistrate thereupon held an inquiry under s. 202 of the Code of Criminal Procedure, and in that inquiry recorded a confession made by the petitioner.

The petitioner was placed upon his trial before the Subdivisional Magistrate on a charge under s. 408 of the Penal Code, but upon an application by the accused the case was transferred by the District Magistrate to the file of a Deputy Magistrate of Gaya.

The Deputy Magistrate framed the following charge against the petitioner:—

"That you between May and August 1904, at Sherpur, being a *sir-panch*, committed criminal breach of trust in respect of three sums, Re 1-11, Rs. 5 and Re. 1-3, which you collected from Rameswar Misra, Mohesh Lal and Harkha Singh, respectively, as chowkidari-tax, and thereby committed an offence punishable under s. 409 of the Indian Penal Code and within my cognizance."

The trying Deputy Magistrate was then transferred from the station, and was succeeded by another Deputy Magistrate, who, after considering the evidence recorded by his predecessor in office and hearing arguments, convicted the petitioner under s. 409 of the Penal Code, and sentenced him to six months' rigorous imprisonment and a fine of Rs. 100.

On appeal preferred by the petitioner, the Sessions Judge of Gaya affirmed the conviction and sentence.

The petitioner then moved the High Court to set aside the aforesaid conviction and sentence mainly on the grounds that the charge as framed was in contravention of the provisions of s. 233 of the Code of Criminal Procedure, and that the statement of the petitioner recorded by the Subdivisional Magistrate in an inquiry under s. 202 not being a statement under s. 164 or 364 of the Code, was inadmissible in evidence, and obtained this rule.

Babu Dasharathi Sanyal, for the petitioner. The charge framed in this case, which is in respect of three different offences alleged to have been committed at different times, is in contravention of the provisions of s. 233 of the Criminal Procedure

Code; and the alleged offences not constituting one series of acts so connected as to form *one* transaction within the meaning of s. 235 of the Code, the conviction based upon the said charge should be set aside: see *Krishnasami Pillai v. Emperor*(1), *Gobind Kaur v. Emperor*(2).

1905.
SAT NARAIN
TEWARI
".
EMPEROR.

As to the statement or confession of the accused, the Subdivisional Magistrate had no authority to record it under s. 164 of the Criminal Procedure Code in an inquiry under s. 202 of the Code, the statement not having been made during an investigation by the police; nor was it recorded under s. 364 of the Code as the accused was not then being tried for an offence. Such a statement is therefore clearly inadmissible in evidence.

The Deputy Legal Remembrancer (Mr. Douglas White) for the Crown. The charge is a perfectly good one regard being had to ss. 222 and 234 of the Criminal Procedure Code. The three offences having been committed within a period of twelve months, the charge comes under s. 234 of the Code: see *Emperor v. Gulzari Lal*(3) which was followed in *Samiruddin Sarkar v. Nibaran Chandra Ghose*(4) and *Emperor v. Ishtiaq Ahmad*(5).

As regards the statement by the accused, it was voluntarily made, and it purports to have been recorded under s. 164 of the Criminal Procedure Code, which is not restricted to police inquiry only. The statement, I submit, is therefore admissible in evidence.

Babu Dasharathi Sanyal, in reply, referred to *Queen-Empress v. Bhairab Chunder Chuckerbutty*(6).

RAMPILAN MUKERJEE J.J. This is a rule calling upon the District Magistrate of Gaya to show cause why the conviction of and sentence passed upon the applicant should not be set aside, upon the ground that the charge is contrary to law, why the case should not be retried, and why, in the retrial, the statement made by the applicant to the Subdivisional Officer of Jahanabad in the

(1) (1902) I. L. R. 26 Mad. 125.

(4) (1904) I. L. R. 31 Calc. 928.

(2) (1902) 6 C. W. N. 468.

(5) (1904) I. L. R. 27 All. 69.

(3) (1902) I. L. R. 24 All. 254.

(6) (1898) 2 C. W. N. 702, 713.

1905. inquiry under section 202 of the Criminal Procedure Code, should not be excluded.

SAT NARAIN TEWARI v. EMPEROR. The facts of the case are these. The applicant, Sat Narain Tewari, was tried for certain offences under s. 409 of the Indian Penal Code. He was the *sir-fauj* of the village, that is, the collecting member of the *panchayat*, and he is alleged in that capacity to have collected three sums of money in 1904, namely, Re. 1-11 on the 5th August, Rs. 5 on the same date, and Re. 1-3 on the 20th May.

These sums were collected from three persons, Rameswar Misra, Mohesh Lal and Harkhu Singh, as chowkidari-tax. Subsequently the applicant was removed from his post of collecting member and was succeeded by Raghunandan Pershad. Raghunandan Pershad appeared before the Magistrate and gave information that the collections of his predecessor, Sat Narain Tewari, were short; and there is no doubt that this was the case. That being so, Sat Narain was put upon his trial for embezzlement of these three sums; and one charge was drawn up, in which all the three sums and the persons from whom he collected them were specified. But he was not charged with three offences under section 409, Indian Penal Code, but with *one* offence under section 409; and he was convicted of *one* offence and sentenced to one term of imprisonment.

Now, the first ground upon which the rule was granted was that the charge was illegal, and that the applicant could not be tried on such a charge.

It is unnecessary to discuss this point at length, because we think the charge was in accordance with sections 234 and 222, sub-section (2) of the Criminal Procedure Code, and this has been held in the cases of *Emperor v. Galzari Lal*(1), *Samiruddin Sarkar v. Nitaran Chandra Gope*(2) and *Emperor v. Ishraq Ahmad*(3). That being so, we do not think that the charge in this case comes within the purview of the ruling of the Privy Council in the case of *Subrahmania Ayyar v. King-Emperor*(4). Accordingly, the first ground on which the rule was granted fails.

But there is another ground, namely, that the admission, or confession, of the applicant, made before the Deputy Magistrate of

(1) (1902) I. L. R. 24 All. 254. (3) (1904) I. L. R. 27 All. 69.
(2) (1904) I. L. R. 31 Calc. 928. (4) (1901) I. L. R. 25 Mad. 61.

Jehanabad on the 19th. December 1904, is inadmissible in evidence. It has been recorded under section 164 of the Criminal Procedure Code, and it is contended that the Deputy Magistrate had no authority to record the confession under section 164, because the case of the applicant was not then under enquiry before the police. Section 164 occurs in the Chapter of the Criminal Procedure Code relating to information to the police and their powers of investigating. Furthermore, it is contended that it is not a statement recorded under section 364 of the Criminal Procedure Code. That, of course, is obvious, because the applicant was not then being tried for an offence. It is urged that it was a statement made in the course of the enquiry which the Deputy Magistrate was carrying on under section 202 of the Criminal Procedure Code. This would seem to be correct; and that being so, the Criminal Procedure Code does not contemplate a statement on the examination of the petitioner being recorded in such proceeding. We therefore think that the statement of the applicant in this case which has been admitted as proving itself, is not admissible as such in evidence; and we are unable to say whether the evidence, other than this so-called confession, is sufficient for conviction.

We accordingly set aside the conviction and sentence, and direct that the applicant be retried.

Whether in the course of the new trial, the admission made by Sat Narain Tewari, when it is obvious he was not in the position of an accused person, can be proved in any way, is a question upon which we do not express any opinion. But we think that when the new trial takes place, the statement which the applicant made to the Deputy Magistrate and which purports to be recorded under section 164 of the Criminal Procedure Code, cannot be admitted in evidence as proving itself.

The rule is made absolute on this ground. The case will go back for retrial. But we consider that it should be retried by some Magistrate other than the Magistrate by whom it has already been tried.

Rule absolute; case remanded.

1905.
SAT NARAIN
TEWARI
v.
EMPEROR.